IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 34

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, EX REL. VIRGINIA STATE BAR,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE.

FOR THE AMERICAN BAR ASSOCIATION:
WAYLAND B. CEDARQUIST, Chicago, Illinois,
Of Counsel for This Cause;
JONATHAN F. ELLS, Winsted, Connecticut,
JAMES T. JENNINGS, Roswell, New Mexico,
HOLCOMBE H. PERRY, Albany, Georgia,
WARREN H. RESH, Madison, Wisconsin,
R. CARLETON SHARRETTS, JR., Baltimore, Maryland,
EARL SNEED, Norman, Oklahoma,
MELVIN F. ADLER, Fort Worth, Texas,
Of Counsel.

THE SHERIDAN-GRAHAM PRINTING COMPANY, CHICAGO

INDEX.

Citations.

Judicial Decisions:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 34.

BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, EX REL. VIRGINIA STATE BAR,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE.

This Brief is filed by the American Bar Association as *Amicus Curiae,* pursuant to the written consent of the Brotherhood of Railroad Trainmen, Petitioner, and Virginia State Bar, Respondent. The stipulation is filed with the Court, with this Brief.

THE OPINION BELOW.

The Opinion below is the Injunction Decree, entered by the Chancery Court of the City of Richmond, Virginia, on January 29, 1962, affirmed by the short Order entered by the Supreme Court of Appeals of Virginia on June 12, 1962, denying the Appeal, with Petition for Rehearing denied on August 31, 1962.

THE QUESTIONS PRESENTED.

The Brotherhood of Railroad Trainmen states (BRT Brief, p. 2) that the questions presented are:

> "(1) Whether the Brotherhood of Railroad Trainmen and its members have the right to make known to its members generally, and to injured members and survivors of deceased members in particular, first, the advisability of obtaining legal advice before making settlement of their claims, and second, the names of competent attorneys to handle such claims, and whether these rights are protected by the First and Fourteenth Amendments to the Constitution of the United States?
>
> "(2) Whether the Federal Railway Act, which authorizes the Brotherhood to represent its members generally and specifically to handle their 'grievances,' creates such an interest in the Brotherhood, that it has the right to make known to its members the advisability of obtaining legal advice and to make known the names of competent counsel in connection with rights of members under the Federal Employers' Liability Act, notwithstanding any rule or doctrine of State law?"

The American Bar Association respectfully submits that the foregoing is an incorrect statement of the questions presented, in that the foregoing fails to relate to the "questions presented" to the "opinion below."

The Virginia State Bar states that the question presented is:

> "Whether the decree of the Chancery Court of the City of Richmond does in fact enjoin, restrain or deprive petitioner of the rights claimed, to-wit, 'the right to make known to its members generally, and to injured members and survivors of deceased members in particular, first, the advisability of obtaining legal advice before making settlement of their claims, and second, the names of competent attorneys to

handle such claims,' whether protected by the First or Fourteenth Amendment or specifically authorized by the Railway Labor Act."

The American Bar Association respectfully submits that this is a more nearly accurate statement of the questions presented.

THE INTEREST OF THE AMERICAN BAR ASSOCIATION.

The American Bar Association, with over 114,000 members throughout the United States is the acknowledged leader of the Legal Profession of the United States as regards the Canons of Professional Ethics. The American Bar Association was organized in 1878. It began work on a comprehensive statement of Canons of Professional Ethics is 1905. It adopted Canons 1 through 32 in 1908. In the period since then, the Association has worked constantly and strenuously to implement the Canons, issuing over 300 Opinions of its Committee on Professional Ethics and meeting the challenge of changing times by continuing study and revision. The American Bar Association, therefore, is concerned that the practice of law retain that characteristic which makes it a profession, namely, ethical standards of conduct with regard to the duty of a lawyer to the Court, to his client, to his fellow lawyers, and to the public.

The interest of the American Bar Association, of course, goes beyond its Canons of Ethics. Those Canons have been adopted by most State and Local Bar Associations throughout the United States. Those Canons, moreover, have served as the basis for Rules of Court adopted by the Supreme Courts of many of the States, particularly in those states having Integrated Bar Associations. The principles set forth in the Canons derive in part from earlier Statutes and those principles are today part of the

Statutory Law of many States. Matters relating to the Canons, therefore, have an import extending far beyond the Canons themselves.

THE THEORY ADOPTED BY THE BROTHERHOOD.

The Brotherhood of Railroad Trainmen seeks a ruling from this Court, that the Brotherhood has the right, protected by the First and Fourteenth Amendments to the Constitution of the United States, and protected the National Railway Labor Act, to make known to injured union members or their survivors, first, the advisability of obtaining legal advice before settling their claims, and, second, the names of specific attorneys to whom they should take their claims. The Brotherhood contends that the Virginia Decree violates these rights and should be reversed.

The theory advanced by the Brotherhood is that, viewing the facts as it sees them, it has the right as a matter of law, to continue its practices.

The facts, as viewed by the Brotherhood, are that its activities, in advising injured members and in sending them to specific attorneys, are nothing more or less than a legitimate union activity, made necessary by the number of injuries encountered in railroading, by the aggressive acts of railroad claim-agents in trying to settle claims based on injuries, and by the ambulance-chasing activities of some attorneys in trying to persuade the injured person to retain them. The Brotherhood called this its "Legal Aid Department." It organized the department in 1930. In the period from 1930 to about 1959, the Brotherhood ran the Department as follows. It "appointed" one Regional Counsel in each of 16 (later 20) Regions through the United States. It "recommended" these attorneys and these alone, to its membership for the handling of their personal injury claims against railroads. It "assisted" the Regional Coun-

sel by requiring members to report their injuries to the attorneys; by requiring local lodge officers to call on the injured man and to repeat to him the "recommendation" that he employ the attorneys; and by requiring everyone concerned to send reports to a central clearing house in Cleveland, Ohio, called the "Legal Aid Office." The attorneys agreed with the Brotherhood that they would handle all cases on a 25 per cent contingent fee basis, netting 75 per cent of any recovery to the claimants. The attorneys paid the local lodge officers for their time and expenses in contacting the injured worker, plus a gratuity for each case brought in. The attorneys subsidized the injured person to a free trip, to and from the attorney's office for the initial interview. If additional monies were needed for medical and diving expenses, the attorneys made a "loan" of the necessary funds, which "loan" was repaid in the event of a recovery, but not otherwise. The attorney bore the cost of maintaining the clearing house in Cleveland or the "Legal Aid Office" as it was called. When this conduct was called into question in Illinois in 1956, and when the Supreme Court of Illinois handed down its decision *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958), the Brotherhood gradually modified its practices, so as to eliminate all financial arrangements between the attorneys and the Brotherhood. The Brotherhood eventually changed the name of its operation from "Legal Aid Department" to "Department of Legal Counsel." The Brotherhood asserts that it no longer controls the pre-selected attorneys as regards the fee to be charged. The Brotherhood admits that it still selects each Regional Counsel; and that it still utilizes its resources to channel injury cases to the pre-selected Regional Counsel.

The Brotherhood, viewing the facts in this light, argues that it has the right to continue the system, as a matter

of law. First, the Brotherhood argues that it is simply advising union members generally as to their legal rights, and recommending specific attorneys, which rights, it is argued, are protected by the First and Fourteenth Amendments. Second, the Brotherhood argues that it has the legal right to continue these practices as part of an alleged statutory right to represent union members in bargaining under the National Railway Labor Act.

THE THEORY OF THE AMERICAN BAR ASSOCIATION.

The theory of the American Bar Association differs from that advanced by the Brotherhood both on facts and the law.

The American Bar Association views the Brotherhood system as one which involves the unauthorized practice of law by a lay organization, and which involves the organized soliciting of personal injury cases by certain attorneys. The Brotherhood system never was a "Legal Aid Department" in any real sense, but has always been a Brotherhood-endorsed system for channeling its members' personal injury cases to specific sets of attorneys throughout the United States. The Brotherhood attorneys, for their part, in the period from 1930 to about 1959, knowingly supervised and financed the actual running of one of the most extensive systems ever devised for the soliciting of cases. In the period since 1959, though no longer financing the system, the Brotherhood attorneys have nevertheless participated in continued solicitation. The American Bar Association contends that the Brotherhood's version of the facts is inaccurate in the following substantial respects:

First, the Brotherhood System was never properly called "The Legal Aid Department." The system actually operated solely to induce Brotherhood members

to retain certain selected attorneys to prosecute personal injury claims against railroads. It never had anything to do with any other type of case. It had nothing to do with "Legal Aid" as the term is generally understood.

Second, the Brotherhood says it is simply "recommending competent counsel" to its members. Actually, the Brotherhood has selected only one attorney or firm of attorneys in each of its Regions. Having selected such an attorney, the Brotherhood goes far beyond "recommending" that attorney to its members, and rather engages in a joint enterprise with the attorney to see to it that he gets the cases.

Third, the Brotherhood states that it has separated itself from attorneys and no longer has any control over them. Actually, the Brotherhood President, though no longer entering into direct written contracts with the attorneys, selects them and has the right to terminate them. The Brotherhood retains just as full control over its selected attorneys as it ever did.

The facts are set forth in detail in the Brief of the Virginia State Bar and will not be repeated in this Brief.

The theory of the American Bar Association as to the general law is that the Brotherhood, to the extent of its participation in the system, is engaged in offering of legal services, which amounts to engaging in the practice of law by an organization which is not and cannot be licensed to do so. The Association believes that, however the Brotherhood system is organized, so long as it involves the offering of legal service by a lay group, it will amount to unauthorized practice of law. The American Bar Association further contends that the attorneys, due to their high degree of involvement in a system of soliciting cases over a long period of time have knowingly violated the estab-

lished standards of conduct for the legal profession as set forth in the Canons of Professional Ethics.

The theory of the American Bar Association as to the law, on the particular record on the appeal before this Court, is that the grounds on which the Brotherhood seeks to avoid the legal effect of its actions are not valid, in that the Virginia Injunction Decree is within that State's constitutional power to regulate the practice of law, and that it does not violate any right of the Brotherhood secured by the First and Fourteenth Amendments. The Association's position, further, is that the second ground on which the Brotherhood seeks to avoid the legal effect of its actions is not valid, in that the National Railway Labor Act has nothing whatever to do with union members' personal injury claims.

The American Bar Association, in short, contends that the Brotherhood's part in this soliciting enterprise is prohibited by law; that the part played by the attorneys in the enterprise is prohibited by the Canons of Professional Ethics; and that the Virginia Injunction Decree, prohibiting such solicitation, is within the power of that State to regulate the practice of law and is not subject to objection on grounds related to Federal Statutes or the Constitution of the United States. The American Bar Association respectfully submits that this Court should dismiss the Appeal or affirm the Virginia Injunction Decree.

ARGUMENT.

POINT ONE.

THE VIRGINIA DECREE IS NOT SUBJECT TO OBJECTION ON THE GROUND THAT IT CONTRAVENES THE BROTHERHOOD'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES. THE VIRGINIA DECREE, PROHIBITING THE ORGANIZED SOLICITATION OF PERSONAL INJURY CASES FOR SPECIFIC ATTORNEYS, IS WITHIN THE POWER OF THE STATE TO REGULATE THE PRACTICE OF LAW. THE BROTHERHOOD, BY OFFERING THE LEGAL SERVICES OF SPECIFIC ATTORNEYS, IS ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW. THE ATTORNEYS, BY KNOWINGLY AND INTENTIONALLY SOLICITING CASES OVER A LONG PERIOD OF TIME, BY ALLOWING A LAY AGENCY TO INTERVENE BETWEEN THEMSELVES AND THEIR CLIENTS, AND BY AIDING A LAY AGENCY IN THE UNAUTHORIZED PRACTICE OF LAW, HAVE VIOLATED THE CANONS OF PROFESSIONAL ETHICS.

A. The Virginia Decree and the Power of the State.

The Virginia Decree enjoins the following activities of the Brotherhood of Railroad Trainmen: (1) giving or furnishing legal advice, (2) solicitation by any means, directly or indirectly, of employment for any attorney, (3) controlling the amount of attorney's fees, (4) sharing in any manner in the legal fees of any lawyer or countenancing the splitting of such fees with any layman or lay agency, (5) any plan, pattern or design that results in channeling legal employment to particular lawyers, and (6) violating the laws of Virginia governing the practice of law.

This Decree is within the power of the State of Virginia to regulate the practice of law. The Brotherhood does not dispute this. It is established that the State Courts have a substantial interest in regulating the practice of law, such

as to permit them to prescribe the obligations of attorneys appearing before them. *Bradwell* v. *Illinois*, 16 Wall. 130, 139, 21 L. Ed. 442 (1873). It is also established that this permits the State Courts to determine who shall not practice law. *People ex rel. Chicago Bar Association* v. *Goodman*, 366 Ill. 346, 8 N. E. 2d 941, cert. denied, 302 U. S. 728 (1937). This includes the power to determine what constitutes the practice of law. *Lowell Bar Association* v. *Loeb*, 315 Mass. 176, 52 N. E. 2d 27 (1943); *Gardner* v. *Conway*, 234 Minn. 468, 48 N. W. 2d 788 (1951); and *West Virginia Bar* v. *Earley*, 144 W. Va. 504, 109 S. E. 2d 420 (1959).

The Virginia Decree, judged solely in the light of these established precedents, is well grounded and not subject to any objection whatsoever. There remains, however, the question sought to be raised by the Brotherhood in the present case, namely, whether the Virginia Decree violates the Brotherhood's rights under Federal Statutes or the Constitution of the United States. The Federal Statute is discussed in this Brief at Point Two, *infra*, p. 23. The constitutional question is discussed immediately hereafter.

B. The Virginia Decree and Constitution of the United States.

1. The Specific Content of the Virginia Decree and the Facts and Law on Which It Is Based.

The American Bar Association respectfully submits that, before testing the Virginia Decree as regards its constitutionality, the exact content of the Decree must first be ascertained. It is not enough to examine the Decree, standing alone. It must be judged in the light of the facts contained in the Record before the Chancery Court. It must also be judged with regard to the principles of law, relied upon as a basis for the Decree. The law in this case relates largely to the Canons of Professional Ethics, and the Rules

of Court, Statutes and Decided Cases embodying the principles of the Canons. The Supreme Court of Appeals of Virginia adopted the Canons of Professional Ethics, as Rules of Court for the Integrated Bar, in 1938. 171 Va., pp. xviii *et seq.* (1938). The facts and the law, in this instance, appear to relate to three principal matters—Soliciting, Intermediaries, and the Unauthorized Practice of Law.

a. *The Soliciting.*

The Virginia Decree enjoins "solicitation by any means, directly or indirectly, of employment for any attorney" and "any plan, pattern, or design that results in channeling legal employment to particular lawyers." It must be noted that the Decree prohibits soliciting with regard to any *specific attorney or attorneys.* It does *not* prohibit general discussion as to the advisability of obtaining legal services, nor does it prohibit general discussion as to the advisability of retaining an attorney, provided the discussion is as to attorneys in general and not in particular. This is entirely consistent with the facts and the law.

Canon 27 prohibits the soliciting of law business by attorneys. This rule of conduct is based on the notion that it is of the essence in any true profession not only that the professional man be skilled, but also that he apply his skill in as objective a manner as possible. Laymen seeking the professional advice of an attorney want, and are entitled to, the attorney's detached judgment. The public is best served by the attorney who strives to give his best individual judgment and whose reputation is based on that judgment. The public is not well served by attorneys who seek to attract clients by self-advertising and soliciting, because these activities make it difficult, if not impossible for there to be any objective judgment. The public generally has wiser instincts in this regard than is usually sup-

posed. Most lay persons instinctively prefer to seek the professional man rather than to be sought after by him. This is one of the basic notions inherent in any true profession.

The Canon against soliciting is also based on the concept that an attorney is an officer of the court. He has an obligation to the court, and to the public, not to stir up litigation. This concept is embodied in Canon 27, prohibiting solicitation, and Canon 28, prohibiting the stirring up of litigation. (See Appendix I, *infra*, p. 27.)

Finally, the Canon against soliciting is based on the public policy that it is improper to subject an injured man and his family to undue pressure, merely to gain his commitment to an attorney's retainer contract.

The Brotherhood system as it operates today includes local union lodge officers, who act as contact men; paid investigators, who act as high-pressure salesmen; and a central office in Cleveland, Ohio, which searches out personal injury claims and helps to solicit them. The system includes persistent and repeated pressure on the injured man, by visits, telephone and mail, all urging him to retain one attorney. The pressure on the injured man is increased by the fact that it is all done in the name of the Brotherhood, so much so that some men sign up under the impression that they are requesting a Brotherhood investigation. The system is designed to be, and is indeed, productive of substantial fees to the Brotherhood-designated attorneys. They know all about the system. They participate in it. Their activity amounts to solicitation, in clear violation of Canon 27. The Brotherhood still promotes and aids this organized solicitation.

The Brotherhood does not seriously contest the conclusion that both it and its attorneys are engaged in the solicitation of personal injury cases. The Brotherhood argues

that, even if it is solicitation, it is justified by virtue of the personal relation said to exist between the union and its members. The difficulty with this argument is that it does not fit the facts. The Canon, in permitting referrals where justified by personal relations, has reference to the occasional recommendations made by one who is closely related, either professionally or personally, to the client. The Canon does not permit any group, whether it is a corporation or an association or a union, to establish an *organized system for channeling clients to pre-selected attorneys.*

The Brotherhood argues that Canon 27 is out-of-date; that it was adopted when economic conditions were different than at present; and that it should therefore not be applied to attorneys for modern labor organizations. The short answer to this is that most courts and most attorneys still consider the principle of the Canon to be valid, namely, that a professional man is better able to render professional service to the public if he is one who does not seek business but whose advice is sought. The Canon has never provided any exception for any one group of attorneys. It would be indefensible to permit the sixteen pre-selected Brotherhood attorneys to solicit law business, while prohibiting such conduct on the part of all other attorneys. The franchise to practice law cannot thus be subdivided into further sub-franchises. It is, and should be, substantially the same franchise for all. The only other alternative would be to permit all attorneys to solicit law business. No partial compromise is possible; for, if one group of attorneys is permitted to solicit, on the ground that they represent a particular group with a so-called community of interest, then it will be a simple matter for any attorney to find a similar group and to claim the same privilege. The result would be that the exceptions to the Canon would consume the Canon itself, until soliciting by all became the rule. This would be intolerable.

Solicitation is not only prohibited by Canon 27 but has been uniformly condemned by the courts. The Brotherhood system itself is condemned in *In re O'Neill*, 5 F. Supp. 465 (D.C.E.D. N.Y., 1933); *Hildebrand* v. *State Bar of California*, 36 Cal. 2d 504, 225 Pac. 2d 508 (1950); *Petition of Committee on Rule 28 of the Cleveland Bar Assn.*, 15 Ohio L. Abs. 106; *Doughty* v. *Grills*, 37 Tenn. App. 63, 260 S. W. 2d 379 (1952); and see *Atchison R. Co.* v. *Jackson*, 235 Fed. 2d 390, 393 (CA-10, 1956). Cases condemning solicitation generally are collected in *Annotation, Advertising by Attorney as Ground for Disciplinary Action*, 39 A.L.R. 2d 1055-1072 (1955); and *Annotation "Ambulance Chasing" or Similar Solicitation of Personal Injury Cases as Ground for Disciplinary Action*, 67 A.L.R. 2d 859-932 (1959). The Brotherhood contends that the *Illinois Brotherhood Case* expressly permits it to make known to its members the names of attorneys who, in its opinion, have the capacity to handle such claims successfully, while it is true that this language appears in the Illinois case, it is respectfully submitted that this does not constitute approval of the continuous reference of personal injury cases to the same attorneys over a long period of time. The Illinois case cannot be construed to permit such organized solicitation, because to do so would fly in the face of the overwhelming weight of authority, including the majority of cases decided in Illinois itself. *In re Donaghy*, 402 Ill. 120, 83 N. E. 2d 560 (1948); and *In re Cohn*, 10 Ill. 2d 186, 139 N. E. 2d 301 (1956).

The Ethics Committees of various Bar Associations, moreover, have had occasion to rule on similar matters. The New York County Bar Association reached the same result where a lay collection agency sought to advertise certain attorneys to its subscribers (Opinion 136, Committee on Ethics, N. Y. County Bar Ass'n.) (Opinions of Committees on Professional Ethics of Ass'n. of Bar of City

of New York, and New York County Lawyers' Ass'n., Columbia Univ. Press, 1956, pp. 589-590). The American Bar Association reached the same result in a case where a manufacturer's association sought to send out bulletins to its members, the bulletin naming a specific attorney as "general counsel" (A.B.A. Opinion 285) (Opinions of ABA Committee on Professional Ethics, 1957, pp. 604-606). These rulings indicate that Canon 27 applies, without discrimination, to all attorneys; and that the "personal relation" exception is not available to any organized group which seeks regularly to recommend that all its members employ certain named attorneys.

b. *Intermediaries.*

The Virginia Decree also enjoins the Brotherhood from "controlling the amount of attorney's fees." This, too, is consistent with the facts and the law.

Canon 35 requires that the attorney's relationship with his client be direct and that it not be subject to the control of any intermediary. (See Appendix I, *infra*, p. 28.) It provides that an attorney may accept employment by a club or association, to render services to it as an entity, but not to render services to its members. This Canon is based on the notion that, as an attorney's services are professional and highly individual, so his relationship with his client should be direct and individual. It is based also on the notion that no other person or group, whose interests may conflict, should be permitted to intervene between the attorney and his client. Finally, it is based on the notion that each person has the right to select his own attorney.

The Brotherhood system puts the union between the attorney and his client. This has two undesirable results. First, it deprives the individual of his freedom to choose his own attorney and thrusts a pre-selected attorney upon

him. The sixteen Brotherhood attorneys, moreover, are pre-selected by the Brotherhood President, solely on his own decision as to location and identity, with the result that, if a Brotherhood member is injured in a designated "region," he is automatically urged to go to the one pre-selected attorney for that region. The second undesirable result is that it deprives the lawyer of his independence of judgment. The testimony, moreover, makes it clear that the Brotherhood President decides what region each attorney should service and what fee he should charge. The possibilities of a conflict in interest in such a situation are clear.

Considerations such as these have led to numerous decisions holding that an attorney cannot accept employment from a corporation, agency or association, if such employment involves the handling of legal matters for employees or members. The American Bar Association has held that this applies to corporations (A.B.A. Opinions 10, 31 and 41, *op. cit. supra*, pp. 79, 115 and 129); an automobile club (A.B.A. Opinion 8, p. 71); a Grange Association (A.B.A. Opinion 56, p. 149); a bankers' association (A.B.A. Opinion 98, p. 213); and manufacturers' associations (A.B.A. Opinions 168 and 273, pp. 341 and 570). There is no reason for not applying the same rule to a labor union.

c. The Unauthorized Practice of Law.

The Virginia Decree also enjoins the Brotherhood from "violating the laws of Virginia governing the practice of law." This is in accord with the facts and the law.

The general rule is that a non-lawyer cannot practice law, nor can he offer legal services on a continuous basis. The leading case is *People ex rel. Chicago Bar Assn.* v. *Chicago Motor Club*, 362 Ill. 50, 199 N. E. 1 (1935). In that case, the Court said (at p. 57), "no corporation, associa-

tion or partnership of laymen can contract with its members to supply them with legal services." This is in accord with the overwhelming majority of decisions throughout the United States. The Rhode Island Supreme Court, for instance, held that the same rule applied to a non-profit voluntary association. *Rhode Island Bar Assn.* v. *Automobile Service Assn.*, 55 R. I. 122, 179 Atl. 139, 100 A.L.R. 226 (1935). The Tennessee Court of Appeals has held that the activities of the Brotherhood of Railroad Trainmen constitute the unauthorized practice of law and has enjoined the same. *Doughty* v. *Grills*, 37 Tenn. App. 63, 260 S. W. 2d 379 (1952).

The public policy behind these decisions is that the franchise to practice law is an individual privilege, granted only to persons who meet certain educational and professional standards. The persons to whom the privilege is granted, moreover, must continue to meet certain professional standards in their practice or be subject to decipline, including possible disbarment. The entire matter is, like the relationship between any professional man and his client, highly individual. If the privilege, or control of the privilege, were to be given to corporations or associations, the individual nature of the franchise would be lost; the individual responsibility would be diluted; and, in cases where professional standards are violated, it would be difficult, if not impossible, for the courts to determine who committed the breach and who should be disciplined.

This public policy has also found expression in an Opinion by the Unauthorized Practice Committee of the American Bar Association. Answering an inquiry addressed to it by the Ethics Committee in 1950, the Unauthorized Practice Committee stated that, in its opinion, a labor union which employed attorneys to give legal advice to union members would be engaging in the unauthorized

practice of law. The opinion, "Informative Opinion A of 1950," is set forth in full, with extensive citations of authority, as Appendix II of the Appendices filed with this Brief.

The facts in the present case clearly show that the Brotherhood of Railroad Trainmen is engaged in the unauthorized practice of law. The Brotherhood selects attorneys to give legal advice to Brotherhood members. The Brotherhood tells its members that the pre-selected attorneys are the only ones who are really qualified to handle their personal injury claims. The Brotherhood does all it can to channel the larger personal injury claims to the pre-selected attorneys.

The Brotherhood argues that its system is not the unauthorized practice of law but is a form of legal aid to those who need it. This argument is, so far as this case is concerned, completely misleading. The record in this case shows that the Brotherhood and its attorneys are concerned only about personal injury claims with a good recovery potential. It is worth noting that a recent book on Legal Aid has this to say about such cases (Emery A. Brownell, "Legal Aid in the United States," 1951, at page 75):

> "*Personal Injury and tort cases.* No Legal Aid organization handles cases which will attract competent attorneys on a contingent-fee basis. This being an acceptable and recognized fee practice of the profession in this country. *Legal Aid is not needed on claims of this sort* unless the amount involved is quite small or the prospect of recovery so slim that an attorney cannot be secured." (Italics added.)

This case, in other words, does not involve any question of legal aid, as the term is generally understood. There is no issue whether labor unions generally can have legal aid plans. There is no evidence in this record concerning what, if anything, other labor unions have in the way of legal

aid. The record clearly shows that the one problem which has concerned the Brotherhood since 1930 is not legal aid for its members but how to handle their personal injury claims. These personal injury claims, by their very nature, attract competent counsel in such numbers that it is absurd to speak of them as being a proper type of case for legal aid. Remunerative personal injury cases and legal aid are mutually exclusive terms.

The proscription of lay groups, from engaging in the unauthorized practice of law, also applies to attorneys who help the lay group.

Canon 47 provides that attorneys shall not aid any lay agency engaged in the unauthorized practice of law. The policy behind this rule is that, if a lay agency is violating the law, *a fortiori* no attorney should be permitted to help it violate the law. (See Appendix I, *infra*, App. p. 29.)

The Brotherhood quotes an observation made by Henry S. Drinker, to the effect that Canon 47 should not apply to attorneys employed by a union to furnish legal aid to union members (Henry S. Drinker, "Legal Ethics," Columbia Univ. Press, 1953, p. 167). The American Bar Association contends that this is not persuasive for two reasons. First, Mr. Drinker was writing in his individual capacity only and not on behalf of the American Bar Association. The Association's position is set forth in its Canon 47, which is still in effect. Second, Mr. Drinker was not referring to a nationwide system for soliciting lucrative personal injury cases.

The facts and the law, therefore, clearly support that part of the Virginia Decree which prohibits the Brotherhood from engaging in the unauthorized practice of law.

d. *Conclusion as to Decree.*

The Brotherhood's basic position is that it should be permitted to continue its practices because it is a labor union whose members face difficult problems in connection with their personal injury claims against their employers. This, however, does not entitle the Brotherhood or its attorneys to special treatment. If the Brotherhood is permitted to continue its practices, every corporation and association will have good ground to claim the same privilege. This cannot be permitted to happen. It is respectfully submitted that the remedies to this situation lie elsewhere—if Brotherhood members are badgered by ambulance-chasing attorneys, complaint should be made and the attorneys should be disciplined; and if the railroads' lay claim agents improperly seek to pressure injured men into fast settlements, the union men can be warned to take care and to file complaints in the event of such overreaching. The remedy for two wrongs—pressure by unethical lawyers and pressure by lay claim agents—is not to be found by creating a third wrong—a highly-organized system for running all members' personal injury cases to selected attorneys.

2. The Virginia Decree Clearly Does Not Violate Any Constitutional Rights of the Brotherhood

This brings us to the heart of this case, as it stands before this Court. The question is whether the Virginia Decree violates the Brotherhood's right of Free Speech.

The American Bar Association respectfully submits that the Virginia Decree clearly does *not* violate the Brotherhood's right of Free Speech. Mr. Justice Holmes once observed, in one of his unpublished writings, that, "The restatement of the obvious is often more important than the elucidation of the obscure." It appears to be obvious

that this cause would not be before this Court but for the fact that this Court recently decided in *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 9 L. Ed. 405, 83 S. Ct. 328 (January 14, 1963). It further appears to be obvious that the *Button Case*, relating to protection of the N. A. A. C. P. right of Free Speech as regards effective expression of its political objectives under *Brown* v. *Board of Education*, 347 U. S. 483 (1954), does not support any claim of the Brotherhood of Railroad Trainmen for protection of entirely different rights, related to the Brotherhood's system for the organized solicitation of the personal injury cases of its members for pre-selected attorneys.

The specific content of the Virginia Decree in the *Brotherhood Case* clearly relates to prohibition of solicitation of personal injury cases for pre-selected attorneys. This is not a "protected mode of expression" within the meaning of those cases striking down limitations on Free Speech. It is, rather, conduct which is within the power of the State to regulate, derived from its control over, and lawful concern with, the practice of law.

The specific content of the Virginia Decree does *not* include any prohibition of general discussion by the Brotherhood with its members concerning the dangers of signing Releases too quickly, or the advisability of seeking the services of an attorney in general. These are "protected modes of expression." But the *Brotherhood Case* is not such a case. The Brotherhood, for over thirty years, has followed a course of action which shows beyond doubt that its chief concern in this area is, not to engage in general discussions with its members on these points, but to get the members to take their personal injury claims to the Brotherhood's pre-selected attorneys. The entire thrust of the Brotherhood's efforts, for instance, has related to the F. E. L. A. claims of its members, which claims are almost certain to result in substantial dollar recoveries

for the claimant and substantial fees for the pre-selected Brotherhood attorneys. The Record is barren of any evidence that the Brotherhood's concern for its members' "individual legal welfare" extends beyond these remunerative cases. The Record clearly shows that the Brotherhood's "Legal Aid Plan" was a sham from the start. It never operated as do the worthy Legal Aid Plans sponsored by Bar Associations and Community Charities throughout the United States. Nor is the Brotherhood genuinely concerned that its members obtain competent lawyers, in the general sense, for their F. E. L. A. claims. The Brotherhood, for instance, has shown no interest whatsoever in working with the Bar Associations to establish a system of referrals under the Lawyer Reference Plan, now in effect in most metropolitan centers. Reference under such a Plan would be to an open list of attorneys, generally screened by the Bar Association and found to be competent in their field and in good standing at the bar. The Brotherhood's interest is in its selected lawyers alone.

The State of Virginia was within its rights in prohibiting the Brotherhood's activities. Similar State action has been upheld, as against claims of infringement of Free Speech, in *Dent* v. *West Virginia*, 129 U. S. 114 (1889); *Semler* v. *Oregon Board of Dental Examiners*, 294 U. S. 608 (1935); and *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483 (1955).

The American Bar Association respectfully submits that the Brotherhood has shown no violation of its right of Free Speech. If it were otherwise, the Canons of Professional Ethics could not be applied to the Brotherhood attorneys or to any other attorney working for any organization on a claim of community of interest, regardless of the fact that the community of interest is pecuniary and not social or political. But it is not so. The Virginia Decree law-

fully implements that State's legitimate interest in regulating the practice of law, and does not violate Free Speech.

POINT TWO.

THE VIRGINIA DECREE IS NOT SUBJECT TO OBJECTION ON THE GROUND THAT IT CONTRAVENES THE BROTHERHOOD'S RIGHTS UNDER THE NATIONAL RAILWAY LABOR ACT. THE RAILWAY LABOR ACT PROVISION AS TO "GRIEVANCES" DOES NOT APPLY TO EMPLOYEES' PERSONAL INJURY CASES.

The Brotherhood argues that the Virginia Decree contravenes the National Railway Act. (45 U. S. C. A. Sec. 151-164.) The Brotherhood contends that the Act's Provisions as to "Grievances" apply to employees' personal injury claims and to the Brotherhood's activities with regard to those claims.

The short answer to this is that the Railway Labor Act deals only with the "interpretation and application of existing agreements as to wages, hours of labor, and conditions of service." It has nothing to do with employees' personal injury claims. The Brotherhood can cite no instance where it has actually sought to have an employee treat his personal injury claim in this manner; rather, the Brotherhood has uniformly channeled these remunerative claims to its pre-selected Attorneys. The Brotherhood knows that the Railway Labor Act has nothing to do with personal injury claims but the Brotherhood persists in trying to find some basis on which it can justify its practices.

The Brotherhood first raised the "Railway Labor Act Argument" in the Illinois Brotherhood case in 1957. Your Counsel for the American Bar Association in the present case appeared as Special Counsel for the Chicago Bar Association in that case in 1956-1958. It was a fact that Edward B. Henslee, Sr., who was a witness before the

Special Commissioner of the Supreme Court of Illinois, testified that personal injury claims were not within the grievance procedures established under the Railway Labor Act (Tr. 127, of the Record in Illinois Supreme Court N. R. 751, 1958). In that case, the Brotherhood's Brief nevertheless attempted to raice the "Railway Labor Act Argument." The Supreme Court of Illinois disposed of the matter by stating:

> "But these injury and death claims are not the kind of labor disputes that the statute contemplates." *In re Brotherhood of Railway Trainmen,* 13 Ill. 2d at 395, 150 N. E. 2d at 166 (1958).

The Brotherhood did not seek review of that ruling by way of Petition for Certiorari before this Court, yet the Brotherhood now argues that the decision of the Supreme Court of Illinois was in error. This is too transparent to require further rebuttal. The plain fact of the matter is that the National Railway Labor Act has never had anything to do with employees' personal injury claims.

CONCLUSION.

The American Bar Association respectfully submits that the Brotherhood of Railroad Trainmen has not established its contention that the Virginia Decree violates its rights under the Constitution of the United States or under any Federal Statute. To the contrary, the Record in this cause shows that the Virginia Courts are acting within their power to regulate the practice of law, in seeking to prohibit the Brotherhood from putting its organized system for the solicitation of personal injury cases into effect within the State of Virginia.

The American Bar Association supports the position of the Virginia State Bar, that the Writ of Certiorari should be dismissed as having been improvidently granted or that the Decree of the Chancery Court of the City of Richmond, Virginia, should be affirmed.

Respectfully submitted,

FOR THE AMERICAN BAR ASSOCIATION:

WAYLAND B. CEDARQUIST, Chicago, Illinois,
Of Counsel for This Cause;

JONATHAN F. ELLS, Winsted, Connecticut,
JAMES T. JENNINGS, Roswell, New Mexico,
HOLCOMBE H. PERRY, Albany, Georgia,
WARREN H. RESH, Madison, Wisconsin,
R. CARLETON SHARRETTS, JR., Baltimore, Maryland,
EARL SNEED, Norman, Oklahoma,
MELVIN F. ADLER, Fort Worth, Texas,
Of Counsel.

Dated: November 26, 1963.

WAYLAND B. CEDARQUIST,
Suite 3000, 33 North La Salle Street,
Chicago 2, Illinois.

APPENDICES

to the

BRIEF OF THE AMERICAN BAR ASSOCIATION,

Amicus Curiae.

APPENDIX I.

CANONS OF PROFESSIONAL ETHICS

of the

AMERICAN BAR ASSOCIATION.

Canon 27. *Advertising, Direct or Indirect.*

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communication or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.

Canon 28. *Stirring Up Litigation, Directly or Through Agents.*

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

Canon 35. *Intermediaries.*

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable

societies rendering aid to the indigent are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

Canon 47. *Aiding the Unauthorized Practice of Law.*

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

APPENDIX II.

INFORMATIVE OPINION A OF 1950

of the

AMERICAN BAR ASSOCIATION.

Committee on the Unauthorised Practice of Law.

The Committee on Professional Ethics and Grievances has propounded to the Committee on Unauthorized Practice of Law the following questions:

"I. A corporation employs a lawyer, *on full time*, part of whose functions is to be available to advise and assist its employees, if they desire such assistance, in connection with their personal problems, such as the drawing of wills, deeds or leases for their dwellings, claims against third parties, for injuries to persons or property, etc. This employment is the result of a bona fide desire to preserve and improve the morale of the employees by keeping them out of legal difficulties, similar in principle to the medical services furnished by many corporations. The service is an agreed part of the compensation of the employee, who pays nothing to the attorney for the services rendered.

II. A labor union employs a lawyer, *on full time*, part of whose duties is to be available to advise and assist its members, if they desire such assistance:

(1) in connection with disputes between the employee-member and the corporation under the union contract;

(2) in connection with their personal problems, such as the drawing of wills, deed or leases for their dwellings, claims against third parties for injuries to person or property, etc. The by-laws of the union provide that the members shall be entitled to this service, which is paid for out of their dues."

And the Committee on Unauthorized Practice of Law has been requested to give its opinion as to whether the "action by the corporation or the union . . . constitute the unauthorized practice of the law in the several instances specified."

A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it,[1a] and whether it is a corporation or a voluntary association operating under a trade name, which employs the lawyers, is unimportant.[1b]

The right to practice law attaches to the individual and dies with him. It cannot be made the subject of business to be sheltered under the cloak of a corporation[2a] because the relationship of attorney and client is personal.[2b] Only a natural person may practice law.[2c]

It is unlawful and against public policy for a corporation to maintain a legal department or hire attorneys and advertise their services for the use of others.[3]

1a *People ex rel Illinois Bar Association* v. *Peoples Stock Yards Bank*, 344 Ill. 462, 176 N. E. 901. *People* v. *California Protective Corporation*, 76 Cal. App. 354, 244 Pac. 1089. In re Otterness, 232 N. W. 318. *Meunier* v. *Bernich*, 170 So. 567.

1b *Rhode Island Bar Association* v. *Automobile Service Association*, 55 R. I. 122, 179 Atl. 139, 100 A. L. R. 226.

2a *The People ex rel. Illinois Bar Association* v. *Peoples Stock Yards Bank*, 344 Ill. 462, 176 N. E. 901. *State* v. *Merchants' Protective Corp.*, 105 Wash., 12, 177 Pac. 694. *People* v. *Merchants' Protective Corp.*, 189 Cal. 531, 209 Pac. 363.

2b Canon 35 of the Canons of Professional Ethics of the American Bar Association.

2c *Boykin* v. *Hopkins*, 174 Ga. 511, 162 S. E. 796. *State ex rel. Lundin* v. *Merchants Protective Corporation*, 105 Wash. 12, 177 Pac. 694. In re Morse 98 Vt. 85, 126 Atl. 550.

3. *Dworken* v. *Apartment House Owners Assn.*, 38 Ohio App. 265, 176 N. E. 577. *People ex rel. Chicago Bar Assn.* v. *The Motorists Assn. of Illinois*, 188 N. E. 827. Act 163 of 1940 (La.) Sec. 280 of the Penal Law of N. Y. Laws of 1931, p. 191 (Ga.) *Richmond Association of Credit Men, Inc.* v. *The Bar Association of the City of Richmond, et al.*, 189 Va. 153.

Automobile clubs organized, among other things, for the purpose of furnishing legal services to its members have been held to be engaged in the practice of law as to such services.[4]

The relationship of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it and a client of the corporation for he would be subject to the directions of the corporation and not to the directions of the client.[5] There would be neither contract nor privity between him and the client and he would not owe even the duty of counsel to the actual litigant.[6]

A corporation or a lay agency cannot do indirectly that which it cannot do directly.[7]

---

4. *Goodman* v. *Motorists Alliance of America, Inc.* Unauthorized Practice Decisions, Brand, page 116; *Dworken* v. *The Cleveland Automobile Club*, 29 Ohio N.P. (N.S.) 607. Brand, UPD; *The People ex rel the Chicago Bar Association* v. *The Motorists Association of Illinois*, 354 Ill. 595, 188 N.E. 827, UPD, Brand, p. 209; *Yeats* v. *Automobile Owners Association of Florida*, 1934, No. 49754-C, Brand, UPD, p. 326; *People ex rel. The Chicago Bar Association* v. *Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1, Brand, UPD, p. 347; *Rhode Island Bar Assn.* v. *Automobile Service Assn.*, 55 R.I. 122, 179 Atl. 139, 100 A.L.R. 226, Brand, UPD, p. 354; In re Maclub of America, Inc. (1936), 3 N.E. (2d), 105 A.L.R. 1360, Brand, UPD p. 512; *Schuur* v. *Detroit Automobile Club et al.* (C.C. Wayne County Michigan, 1932), In Chancery No. 194195, Brand, UPD, p. 698.

5. *Rhode Island Bar Assn.* v. *Automobile Service Assn.*, 55 R.I. 122, 179 Atl. 139, 100 A.L.R. 226. *Richmond Assn. of Credit Men, Inc. et al.* v. *the Bar Assn. of the City of Richmond*, 189, Va. 153.

6. See cases cited supra under (5).

7. See citations under (4) supra, also informative opinion No. 2 of 1942 from the Committee on Unauthorized Practice of Law to the Committee on Professional Ethics and Grievances. *Richmond Association of Credit Men, Inc.* v. *The Bar Association of the City of Richmond, et al.*, 189 Va. 153.

An attorney is not an officer of the State in a Constitutional or Statutory sense of that term, but he is an officer of the Court exercising a *privilege* during good behavior. This *privilege* is granted by the Court in the exercise of judicial power, not as a mere ministerial power.[8]

The *right* to practice law is not a *privilege* or *immunity* granted to all citizens of the United States, but is a franchise from the state conferred only for merit, and is not a lawful business except for members of the Bar who have complied with all the conditions required by statute and the rules of Court.[9]

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, *as an entity*, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.[10]

---

8. In re: Greathouse 189 Minn. 51; 248 N.W. 735 at 737.

9. *Meunier* v. *Bernich*, 170 So. 567, In re Lockwood 154 U. S. 116, 14 Supr. Ct. 1082, 38 L. Ed. 929. *State* v. *Rosborough*, 152 La. 945, 94 So. 858. In re Cooperative Law Co. 198 N.Y. 479, 92 N.E. 15. *People ex rel Los Angeles Bar Assn.* v. *California Protective Corp.*, 76 Cal. App. 354, 244 Pac. 1089. *Dworken* v. *Apartment House Owners Association*, 38 Ohio App. 265, 176 N.E. 577. *Fitchette* v. *Taylor*, 191 Minn. 582, 254 N.W. 910.

10. Canon 35 of the Canons of Professional Ethics, American Bar Association, and the following opinions of the Committee on Professional Ethics and Grievances, viz:

Opinion 8—It is improper for a lawyer to accept employment with an automobile club which in soliciting memberships offers certain services of its "Legal Department" to members. (Issued prior to the adoption of Canon 35.)

Opinion 10—A lawyer who is a salaried employee (trust officer of a trust company) may not act as the lawyer for patrons of his employer. (Issued prior to the adoption of Canon 35.)

Opinion 31—A lawyer may not aid a lay corporation which employs him and which is engaged in the business of incorporating

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.[11]

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer.[12] If such were permissible, it would permit the corporation or lay agency to do that which the lawyer could not do; namely, the solicitation of business.[13]

Whether the attorney is paid for his services by the corporation, whether the work for the individual is included in his general corporate retainer, or whether he is paid at all, is unimportant. The fact is that the services, in such cases, are rendered because of the attorney's employment by the corporation, and the vice is that there is a divided allegiance.[14]

---

companies, to practice law by accepting employment from it to do legal work for its patrons.

Opinion 35—A lawyer may not permit his services to be exploited by a collection agency.

Opinion 56—A lawyer may not accept employment from a grange association to handle matters for its members.

Opinion 122—It is improper for a lawyer to cooperate with a trust company or other lay institution to facilitate its unauthorized practice of law.

Opinion 162—It is improper for a lawyer who is counsel for an organization to furnish free legal advice to its members.

Opinion 237—A lawyer representing and paid by an artist representative, may not properly represent the artist with whom he has no direct relations, to draw up the artist's contract of employment by the motion picture company.

11. Canon 47 of the Canons of Ethics of the American Bar Association and Opinion 122 thereunder, viz:

Opinion 122—A lawyer might not, prior to adoption of canon, properly cooperate with a trust company or other lay institution to facilitate its unauthorized practice of law.

12. *Richmond Association of Credit Men, Inc.* v. *The Bar Association of the City of Richmond, et al.*, 189 Va. 153.

13. See citation under 12 supra.

14. *People* v. *Peoples Trust Co.*, 167 N. Y. S. 767.

Conclusion.

This Committee is of the opinion that the practices described in the propounded questions hereinabove set forth in full constitute the unauthorized practice of law.

However, whether it is professionally improper for a lawyer to represent an individual member of a corporation or lay agency, at the expense of the latter, where such representation is for the promotion of the common interest of the shareholders of the corporation or members of the lay agency and not merely for the benefit of the individual, as, for example, in a test case,[15] is a matter involving ethics alone, which this committee does not seek to pass upon.[16]

STANDING COMMITTEE ON
UNAUTHORIZED PRACTICE OF LAW

15. Question II(1) does not clearly set forth this situation.

16. See answer 363 of the Committee on Professional Ethics of the New York County Lawyers' Association.

REPLY BRIEF FOR THE PETITIONER

[illegible]

[illegible]

Petitioner,

v.

[illegible], ex rel.
Virginia State Bar,
Respondent.

[illegible]

[illegible]

[illegible]
[illegible] Nat'l. Bank Bldg.
Richmond, Virginia

John J. [illegible]
[illegible]
120 [illegible] Building
Chicago 2, Illinois

Counsel for Brotherhood of Railroad Trainmen

[illegible]
2411 Chrysler Building
New York 7, New York

Of Counsel

INDEX

TABLE OF CASES

STATUTES

OTHER AUTHORITIES

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 34.

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, ex rel
Virginia State Bar,
Respondent.

REPLY BRIEF FOR PETITIONER

I.

THE QUESTIONS PRESENTED

The paramount questions for the Court are presented in Petitioner's Brief. (PB 2) There, Petitioner raises questions of the right of free expression and communication with its members and rights given to it under Railway Labor Act.

THE MOOT NATURE OF MUCH OF THE EVIDENCE REFERRED TO BY RESPONDENT

Most of the evidence referred to by Respondent is of a moot nature. But since the Respondent has seen fit to

make reference to certain isolated parts of the record to create an unfavorable picture of the operation of the Legal Aid Department, the Petitioner will reply generally and in some instances specifically to Respondent's "restatement" of the case, which covers 37 pages of its brief, consisting of 56 pages.

FIRST UNFAVORABLE PICTURE CREATED BY RESPONDENT

Respondent in its brief (RB 8) infers and leaves the impression that T. J. McGrath, General Counsel of the Brotherhood, at the time of the establishment of the Legal Aid Department, and the selection of Regional Counsel, preferred lawyers who had been engaged in ambulance chasing.

HOW McGRATH SELECTED REGIONAL COUNSEL

The following are excerpts from the annual report of Thomas McGrath, General Counsel, who made the selections of Regional Counsel in 1930. (Plf. Exh. 13, R 786, 787, 788)

> Because of the importance of selecting lawyers who, because of their experience, ability and character, were considered to be the best available * * * it was felt that personal investigation by General Counsel should be made in each city where it was intended to locate regional counsel.
>
> * * *
>
> In all the selections above mentioned, except that of

Mr. Frank C. Hanley and Mr. Charles Murphy, the undersigned *went to the cities in which regional counsel* live, and made a thorough investigation of all reputable attorneys; who were recognized as specialists in the handling of railroad damage suits, in each of the cities named. *Information as to the standing and ability of these lawyers was obtained by interviewing, in many instances, local lodge officers, officials of local bar associations, judges of courts* and insurance lawyers. * * * Messrs. Hanley and Murphy are and have been for many years, members of the Brotherhood and their reputation, standing and ability have been thoroughly known to the Grand Lodge officers for years. * * *

SECOND UNFAVORABLE PICTURE CREATED BY RESPONDENT

Respondent said in its brief (RB 9, 10, 11) that after a decision in the case of Dworkin v. Brotherhood of Railroad Trainmen, Grand Lodge, Petitioner agreed to eliminate certain objectionable practices, but it continued the objectionable practices until April 1, 1959.

The case of Dworkin v. Brotherhood, No. 353,975, Court of Common Pleas, Cuyahoga County, Ohio (1932), involved the giving of opinions by the Legal Aid Department to members and dependents respecting their legal rights, and the support of the Legal Aid Department.

Upon statement of counsel that the Petitioner had discontinued the former method of operating its Legal Aid Department, by consent of both parties, the case was dismissed May 4, 1932.

There is no evidence in the record that Petitioner, after the Dworkin case continued to advise its members legally, or that it received any money for the support of the Legal Aid Department in the *State of Ohio*.

W. P. Kennedy, President of the Brotherhood, testified in reference to the Dworkin case in part: (R 56)

> * * * we lived up to the court's rulings, whatever the ruling was. We haven't been in violation of any court's ruling, to my knowledge. * * *

The rules and regulations of Regional Counsel and the Brotherhood originally provided that members would "be advised as to their legal rights." (Plf. Exh. 5, R 760)

After the Dworkin case, the rules and regulations were changed to comply with it. The pertinent part reads:

> "The Brotherhood and its employees shall not undertake to furnish members of the Brotherhood, or their dependents, with any advice or information as to their legal rights. It is to be distinctly understood that all legal opinions, or matters pertaining to the practice of law, shall be obtained through duly licensed lawyers, and that no layman shall be permitted to infringe in any manner upon the rights or privileges of practicing attorneys." (R 839, 840)

The Respondent said (RB 13) in its brief that notwithstanding the "protestation" Petitioner admits in the case at bar the established fee splitting did continue until April 1, 1959. This is intended, of course, to smear the Petitioner and divert the Court's attention from the paramount issues.

THE FIRST APPELLATE COURT'S DECISION RENDERED IN 1932

The first decision construing the plan of the Brotherhood by an intermediate appellate court was in 1932 in *Ryan* v. *Penn. R. Co.*, 268 Ill. App. 364, 373. The Court made a clear distinction between referrals by the Brotherhood to Regional Counsel and unlawful solicitation of legal cases and approved Petitioner's plan.

The opinion in the Illinois Appelate Court was rendered in 1932, while the opinion in *In re: Petition of Committee of Rule 28, Cleveland Bar*, 15 Ohio L.Abs. 106, intermediate Appellate Court, was rendered in 1933.

THIRD UNFAVORABLE PICTURE CREATED BY RESPONDENT

The Respondent in its brief (RB 12) uses the opinion of *In Re: O'Neill*, 5 F.Supp. 465, to show that it was in conflict with the Ryan case. However, the court in that case directed its attention to the sole question of the contract arrangement with the Brotherhood and O'Neill, and held O'Neill would not be permitted to proceed with the cases he was handling for Brotherhood members, until he had filed an affidavit in each case showing that the contract arrangement with the Petitioner had been rescinded.

The Court said:

> As to so much of the union activity this court is prepared to believe that the organization was performing a *valuable service to its members.* (Emphasis supplied)

In effect the court's holding was the same as in the case of In re: Brotherhood of Railroad Trainmen 1958, 13 Ill. (2d) 391.

FOURTH UNFAVORABLE PICTURE CREATED BY RESPONDENT

Respondent in referring to the case of *Young* v. *GM & O. Rwy. Co.*, (1946) Mo. (RB 12, 13, 14) said in part:

> "In his defense Regional Counsel admitted that Petitioner's Legal Aid Plan had operated from its inception until June 15, 1946, as originally set up with all of the objectionable features condemned in prior court decisions (and despite the assurance given in the Dworkin case) and stated that the plan had been brought to an end on June 15, 1946, because criticism by courts, lawyers and bar associations."

The Respondent ignores the decision of the Appellate Court in *Ryan* v. *Penn. R. Co., supra,* and relies on the Dworkin case, which was dismissed by the lower court.

The Ohio lower court could not have enjoined the Brotherhood from operating in Missouri and New York under its plan, had it so desired.

The case of *In re: Petition of Committee on Rule 28 of the Cleveland Bar Association* was against Regional Counsel. In that case the court refused to enjoin Regional Counsel, but in a 2-1 decision it did reprimand him.

Petitioner contends that it has complied in every respect

with the agreement in the Dworkin case in the *State of Ohio.*

THE ORIGINAL PLAN OF THE BROTHERHOOD WAS DISCONTINUED

On June 15, 1946, the Brotherhood ceased to accept any fee on cases being handled by Regional Counsel in any State of the Union. (Plf. Exh. 21, R 485, 831, 833, 834, 835, 836)

The record is not clear when the plan, which was described in Respondent's Bill of Complaint, came into existence. Certainly it was after June 15, 1946, and before W. P. Kennedy became President of the Brotherhood.

The change in the plan of operating the Legal Aid Department shows that the Brotherhood modified its plan to comply with the opinion of certain courts, lawyers and bar associations.

FIFTH UNFAVORABLE PICTURE CREATED BY RESPONDENT

Respondent says in its brief (RB 14) that in 1948 Regional Counsel Joseph B. McGlynn and others, were enjoined in North Carolina from advertising, soliciting and giving legal advice in that State and from transporting cases out of North Carolina.

The full decree makes no reference to the Brotherhood or the plan of the Legal Aid Department. (R 843) The decree is not pertinent to the issue before the court and should not have been introduced.

II.

THE LEGAL AID DEPARTMENT UNDER PRESIDENT KENNEDY 1949—APRIL 1, 1959

When W. P. Kennedy became President of the Brotherhood in 1949, he began an investigation as to the operation of the Legal Aid Department, because he was not satisfied with certain procedures which he found to exist throughout the United States. (R 47)

Mr. Kennedy said that it took considerable time to ascertain how he could bring about a so-called official clarification of the rights of the Brotherhood in the operation of the Legal Aid Department. He finally came to the conclusion that a considerable amount of so-called legal aid business was handled in the State of Illinois on account of its being a centrally populated state, so he authorized the suit *In re: Brotherhood of Railroad Trainmen in the Supreme Court of Illinois, in 1955.* (R 49)

PRIOR TO THE ILLINOIS CASE THERE WAS ONLY ONE STATE SUPREME COURT CASE

Prior to the Illinois suit in 1955, there was only one Supreme Court case: *Hildebrand* v. *State Bar of California* (1950), 36 Cal. (2d) 504; which involved directly a Regional Counsel. The case of *Doughty* v. *Grill* (1952) 37 Tenn. App. 63, 260 SW (2d) 379, an intermediate court, did not directly involve Regional Counsel or the Brotherhood. The Petitioner has heretofore discussed the Hildebrand case, so it will discuss only the Tennessee case.

The original bill in the case of Doughty v. Grill sought an injunction against the defendants, R. E. Grill and T.

W. Wooten, restraining them from acting as "runners" and solicitors of personal injury cases against railroads on behalf of certain attorneys.

A jury was empaneled to try the issues of fact. To questions propounded the jury answered that neither defendant had solicited or recommended employment to any of the injured persons shown in the proof with respect to the settlement of their claims.

The Chancellor approved the verdict of the jury and dismissed the bill. However, on appeal the intermediate appellate court of Tennessee reversed the lower court and granted the relief sought. The court, however, said at page 94:

> The Brotherhood is not a party to this suit, nor is Mr. McGlynn, and we, of course, do not undertake to make an adjudication binding upon them, or either of them, as to whether either or both were engaged in the illegal practice of law. It may be that if pertinent facts as to which the record is silent were fully developed, a conclusion different from that reached on this aspect of the case would be required. * * *

At the time of the Illinois opinion, that court had before it evidence similar to the evidence introduced in all the cases cited by Respondent. In addition, the court had the benefit of the opinion and decrees in all of the cases, excepting the cases of State, *ex rel Beck* (1960), 170 Neb. 376; *State, ex rel Oklahoma Bar Assoc.* v. *Brotherhood, et al* (1960), No. 38373, Supreme Court of Oklahoma; *Hulse* v. *Brotherhood of Railroad Trainmen* (Mo. 1960), 40 SW (2d) 404, in which consent decrees were entered.

Also, the court had briefs from the American Bar Association, Chicago Bar Association, Illinois Bar Association and 27 railroads.

All the consent decrees aforesaid should not have been introduced as evidence, as they have no value as precedents. *Texas & P. R. Co.* v. *S. Pac. Co.*, 137 U.S. 48, 11 S. Ct. 10; *Freuehauf Trailer Co.* v. *Gilmore*, 10th Cir. 167 F. (2d) 324, 330.

However, it might be pointed out that the Oklahoma decree incorporated the Illinois opinion by reference and the Missouri decree set out a portion of the opinion of the Illinois court verbatim. (Plf. Exh. 29, 30, R 857, 573)

While the Nebraska consent decree did not specifically refer to the opinion in the Illinois case, it did enjoin and restrain the Brotherhood from doing what the Illinois opinion said the Brotherhood could not do. (Plf. Exh. 28A, R 852)

Respondent refers (RB 25) to the employment of Marko Verbon and called him a Regional Investigator of the Brotherhood and said:

> Notwithstanding his appointment as Regional Investigator for the Brotherhood carrying a regular investigator's card signed by President Kennedy, he never made an investigation.

If Marko Verbon's testimony can be believed, he was nothing but a solicitor hired by Interstate Investigation Bureau and worked with one of Petitioner's Regional Counsel. (Nelson Exh. K, R 521, 1067, 1068) Verbon's evidence shows that his duty was to solicit any and every

kind of damage case, whether it pertained to injured Brotherhood members or otherwise. He did not make any investigations of accidents.

C. R. Maher, Chief Clerk of the Legal Aid Department explains that some Regional Investigators were put on the payroll of the Brotherhood in certain instances at the request of Regional Counsel, and charged against the operating expense of the Legal Aid Department. (R 994)

When Verbon first began to work, he was paid by *Interstate Investigation Bureau*. He was not a Regional Investigator (R 1067). He was placed on the Brotherhood's payroll at the request of one Regional Counsel. (January, 1956, R 1068) He received commissions from *Interstate Investigation Bureau*, along with a salary. (R 1068)

Technically, Verbon was on the payroll of the Brotherhood as an Investigator, but he testified that he did not make investigations of accidents. He was purely a solicitor of any and all kinds of accident cases for people who paid him, which was not the Brotherhood, for it was reimbursed. (R 994)

The evidence shows that Verbon's conduct was an abuse of the duties of an Investigator and the plan of the Legal Aid Department. President Kennedy fired Verbon in 1957 upon hearing of his conduct. (R 72, 1068)

DUTIES OF INVESTIGATORS OF THE BROTHERHOOD

Respondent puts all of the Brotherhood Investigators in the class with Verbon, who never investigated a case. However, the record shows that Investigators for the

Bortherhood under the Legal Aid Plan had more important duties to perform, some of which were as follows: (Plf. Exh. 30, R 865)

(1) To gather certain necessary information and statistics on the cause of each accident, the nature and extent of the injuries, and the fault, if any, upon the part of the railroad company, including any apparent violations of the Safety Appliance Act, the Boiler Inspection Act, the Air Brakes Act, the 72-Hour Law and the Hours of Service Law.

(2) To apprise the injured member, or the survivors in the case of death, of the existence of the various departments of the Brotherhood, including Insurance, Legal Aid and Protective Departments as they might relate to the particular circumstances of the casualty involved.

Respondent in its brief (RB 29) states that Petitioner in January, 1959, made a most revealing admission that the Brotherhood itself reimbursed its representatives at their hourly rate of pay, plus expenses, for time involved in bringing injured employees to the office of Regional Counsel.

The explanation of this is that an injured man is insecure and desires some member of his lodge to accompany him to Regional Counsel's office, which is usually situated several hundred miles from the home of the injured member. A fellow worker and a brother member should not be expected to lose time from his work without being reimbursed. (R 270) Members of the Brotherhood are not men of means. Respondent infers that the members are being paid, which, of course, is not true.

The Supreme Court of Virginia, in striking down Chapter 36, Section 18-349.1 to 18-349.37, inclusive, of Code of Virginia, 1950, as amended, in the case of *NAACP* v. *Harrison*, 202 Va. 142, p. 162, said:

> The law has always recognized the right of one to assist the poor in commencing or further prosecuting legal proceedings. * * * Aiding the indigent is one of the generally recognized exceptions to the law of maintenance.

Formerly Regional Counsel reimbursed the member who accompanied the injured man to his office. This was fully discussed *In re: Brotherhood of Railroad Trainmen* (1958) 13 Ill. (2d) 391, and Regional Counsel was prohibited from continuing this practice, but not the Brotherhood.

Respondent also complains of President Kennedy's testimony that Petitioner gives legal advice (RB 48). The president of Petitioner does so state (R 63) but only in the sense, as he explains, that the member is notified as to his legal rights and it is suggested that he confer with a competent and qualified attorney for further handling.

A conflict of loyalty is then conjectured out of pure gossamer but "channelling" is defined as the result of effective group solicitation (RB 49). Of course, Respondent ignores the previous cases cited in Petitioner's Brief dealing with "channelling" and, by so doing, reduces "channelling" to the status of an unnecessary summary of the effects of a plan already subject to condemnation because of its inherent unethical solicitation. Such sophistry is typical of Respondent's Brief. On the other hand, it is clear that the Decree below is drawn in such broad terms as to ef-

fectively preclude the exercise of any constitutional rights of free speech by the Brotherhood, its agents or its members and, indeed, to prohibit any effective exercise of the right to freedom of association by the members of Petitioner.

III.

THE PLAN AFTER APRIL 1, 1959

The President of the Brotherhood testified that after 1960 Regional Investigators were eliminated. (R 69) He further testified that if he wanted a case investigated, he would designate some member or members of a local lodge to investigate the case. He gave these members a signed card designating them as official investigators, in the territory of their particular lodge. (R 130)

Respondent argues that a member of a local lodge, carrying an Investigator's card, *is at all times acting for and in behalf of the Brotherhood,* especially if he calls on an injured brother in the hospital.

As President Kennedy testified, many accident cases are never investigated by any one. (R 66) Therefore, it is the position of the Petitioner, that any local lodge member who carries an Investigator's card is a special agent of the President of the Brotherhood, and if the President should request him to investigate an accident, then the officer has the authority to investigate the accident for the Brotherhood. This authority should not be confused with the Secretary of lodges, whose duty it is to report accidents under the Constitution to the Brotherhood.

VIOLATIONS OF STATE DECREES WOULD NOT DENY PETITIONER ITS CONSTITUTIONAL RIGHTS OR ITS RIGHTS UNDER THE RAILWAY LABOR ACT

The Respondent argues on pp. 34, 35, 36, 37, 38, 39, 40 and 41 of its brief that "solicitation continues according to the original plan after April 1, 1959" by representatives of the Brotherhood.

The position of the Petitioner is that it is in compliance with the Illinois opinion, and is not breaking any state law. (R 51, 52, 57, 58, 59, 60, 129, 130, 131) If this is not true, then Petitioner should be cited for contempt of court in those states which have entered decrees. However, violations of state decrees would not deny Petitioner its constitutional rights or its rights under the Railway Labor Act.

If Legal Counsel of the Brotherhood is violating any court decree or violating any statute, rule or canon of ethics of his profession, then disciplinary action should be taken against him by local authorities.

The Illinois opinion prohibited the Brotherhood from operating the Department of Legal Counsel as it had been operating prior to July 1, 1959. It did not, as Respondent argues, prohibit Legal Counsel who might have been in arrears of his indebtedness to the Brotherhood prior to July 1, 1959, from paying the Brotherhood. (R 720, 721)

Legal Counsel at the time of the Illinois case, paid the Legal Aid Department for its operating expenses, after the expenses had been calculated at the end of the calendar year. (R 703)

For example: Expenses incurred by the Brotherhood were paid for the year 1958 in 1959, and for the year 1959 in 1960. That is why the records of the Brotherhood show that Legal Counsel paid the following accounts: (R 1322, 1323)

Refund from Regional Counsel (for Investigators and office expenses):

1957	1958	1959	1960
$203,423.28	$156,902.27	$158,080.06	$ 23,410.31

Mr. John Orpin, General Auditor testified there were no receipts from the Department of Legal Aid for 1961. (R 692, 695)

EVIDENCE INTRODUCED BY RESPONDENT WHICH SHOULD NOT HAVE BEEN CONSIDERED

The Respondent said (RB 40) in its brief that Tom Lewis, Jr., Regional Counsel, of Atlanta, Georgia, appeared at the home of the widow of Jim Doyle Queen, a trainman, and solicited her case. The Respondent relies on the testimony of Betty Ann Queen (Doag), widow, who was secured by a representative of the Association of American Railroads, for Respondent.

The witness testified in a prior case (*Ga. v. B. G. Byington*) diametrically opposite to the testimony given in the case at bar. R 555, 1349, Plf. Exh. A, R 1325)

The following exhibit of Respondent should not have been introduced in evidence or received in evidence:

The case of *Georgia* v. *B. G. Byington* (R 714, 715, Plf. Exh. A, R 1325) should not have been introduced or received in evidence. It was a criminal case, not involving the Brotherhood and has been reversed by the Supreme Court of Georgia, 218 Ga. 440, 128 SE (2d) 329.

In reversing the courts below, the State Supreme Court said:

> "The indictment charged the defendant with no violation of a public law. The holding of the court of appeals to the contrary and the defendant's conviction are accordingly reversed."

A further side light on the *Byington* case demonstrates why the Brotherhood was compelled to establish the Legal Aid Department to protect its members.

Byington, a long time employee of the Central of Georgia Railroad, was fired by it and charged with "trying to prevent or discourage employees of the (railroad) from making settlement claims involving personal injuries * * *". See: *Brotherhood of Trainmen & B. Grady Byington* v. *Central of Georgia Railroad,* 305 F.(2d) 605. In the suit to reinstate Byington, the court said, in part, that a railroad is not free to frustrate and undermine the effectiveness of bargaining representative of employees by securing Byington's discharge. (Railway Labor Act, Sec. 3, subdiv. 1(1) as amended, 45 U.S.C.A., Sec. 153, sub. 1(1).

The case was affirmed in part and remanded in part.

A further reason why the Respondent should not have introduced Plaintiff's Exhibit A is:

The general rule is that a judgment to be evidence against a party in another suit upon a different cause of action, it must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases and must have been determined upon its merits. Fishburne v. Engledove, 91 Va. 548, 22 S.E. 354; Richmond v. Sitterding, 101 Va. 354.

IV.

RESPONDENT ALLEGES PETITIONER VIOLATED PROHIBITIONS OF ILLINOIS CASE.

Respondent alleges in its brief (RB 34-40) that the Petitioner violated certain prohibitions in the Illinois opinion, and listed the names of certain injured members involved therein.

Petitioner shall summarize the testimony of some of the witnesses for the purpose of showing the true picture.

The evidence shows that when a member was injured, some members of his lodge, known to the member, usually called on him and during the conversation recommended legal counsel. The injured member could employ any lawyer he desired. (R 63, 164, 187, Plf. Exh. 5, R 760, 839, 840)

WITNESSES INTRODUCED BY RESPONDENT

CHARLES WILSON CLARK, Philadelphia, Pennsylvania, testified that he was injured for a second time in 1959, and further that Regional Counsel (Henslee) had represented him when he was first injured; therefore, he

communicated with Mr. E. B. Henslee, Jr., Regional Counsel, son of the E. B. Henslee, Sr., deceased, former regional Counsel. (R 253, 254)

ELMO S. LOMAN, Newark, California, testified that he went to the Brotherhood office after being injured and while there talked with the local chairman, Stanly Rider, who asked Loman if it would be all right if he (Rider) sent some one to see him about his injuries. In response to this conversation, a representative from Regional Counsel went to see Loman. (R 298, 299)

LAWRENCE EDWARD TROXTELL, testified that he called George P. Rummell, who was local griever of his local lodge and later Mr. Rummell went with him to see Mr. Harrington of Henslee and Henslee, Legal Counsel. (R 347) And he further testified that he had sent a letter to the Department of Legal Counsel, Cleveland, and requested it to assist him. (R 365)

Respondent says in its brief (RB 40) that Kenneth Gibson, James Garwood, of New York, and Charles Clark, of Philadelphia, all gave written statements that they had been solicited. Likewise other statements of witnesses were taken by the Association of American Railroads, and were in most instances contradicted by the witnesses when testifying.

Respondent under Section 8-293 of the Virginia Code of 1950, could not have legally introduced the written statements of its witnesses to contradict and impeach them, without complying with the statutory section above; which it did not do.

V.
THE COURT HAS JURISDICTION

The Respondent asserts in its brief (RB 43) that the questions presented by Petitioner and the subsidiary questions set forth no controversy.

The Chancery Court decree enjoined Petitioner, its officers, agents, servants and employees and its members acting in its behalf, among other things: (R 27)

(1) from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; * * *

(2) or in any other manner soliciting or encouraging such legal employment of the selected lawyers; * * *

(3) and from doing any act or combination of acts, and from formulating and putting into practice, *any plan,* pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers.

Therefore, Petitioner, contrary to what Respondent says, has been enjoined from holding out or telling its injured members of "Legal Counsel" who has been selected and approved by the Brotherhood as being competent to handle claims of injured and deceased members.

The Petitioner asserts that the decree of the lower court denies it and its members rights under the Federal Constitution, and Railway Labor Act.

Respondent's contention that this court is without jurisdiction to review the instant case, based on its conten-

tion that there is no question in issue, is contrary to the plain wording of the Decree entered below (R. 25-28). In that Decree, the court finds that Petitioner still adheres to the pattern and design of its plan as formulated and implemented in 1930 (R. 27). It is in this context that the court enjoins the Petitioner and its agents and members from 1) informing any lawyer that an accident has occurred or from furnishing the name and address of an injured or deceased member for the purpose of obtaining legal employment for such lawyer and 2) from doing any act, or combination of acts, or from formulating any other plan, pattern or design, the result of which is to "channel" legal employment to any particular lawyer or group of lawyers. Such Decree prohibits the Petitioner from any effective advocacy to its members 1) of the advisability of obtaining legal advice before making settlement of their claims and 2) of the recommendation of particular attorneys to handle such claims.

It is said that the common law processes relating to barratry, champerty and maintenance are the basis of the Decree below. If such is the case, the Decree below is basically erroneous since it is well established that malicious intent is essential to such common law offenses. *NAACP* vs. *Button*, 371 U.S. 415, 9 L.Ed. 2d 405, 422 (1963).

Petitioner prints in the appendix hereof the opinion of the Chancellor in the case of *Commonwealth of Virginia, ex rel. Va. State Bar* v. *National Association for the Advancement of Colored People, etc., et al*, dated June 28, 1963, which gives the thinking of the lower court on the case of *NAACP* v. *Button*, 371 U.S. 415, and in addition "or by any other group."

THE RESPONDENT IGNORES PETITIONER'S CONSTITUTIONAL RIGHTS

The Respondent asserts (RB 46) that it "rests its case * * * upon the traditional prohibitions of the common law, the rules of the Supreme Court of Appeals of Virginia defining the practice of law and the canons of professional ethics adopted therein, and the statutes collateral thereto then and now in force and effect."

The Respondent further says (RB 47) that "the Button case appears to rest in 'the vital fact' that the Court viewed the practices thereunder consideration as a constitutionally privileged 'form of political expression' to secure constitutional civil rights. In the case at bar the civil action for personal injury is clearly not 'a form of political expression.'"

The right asserted by the Petitioner is one of "free expression" or "communication" for the sole purpose of telling injured members to consult with attorneys before settling their cases, and to employ attorneys, if necessary, who have been successful in handling cases under the F.E.L.A., and Safety Appliance Act.

The Supreme Court of Virginia said in *NAACP* v. *Harrison*, 202 Va. 142, at p. 165:

> (a) the appellants and those associated with them may not be prohibited from acquainting persons with what they believe to be their legal rights and advising them to assert their rights by commencing or further prosecuting a suit against the Commonwealth of Virginia, any department, agency or political subdivision thereof, or any person acting as an officer

or employee of such, but in so advising persons to commence or further prosecute such suits, the appellants, or those associated with them, shall not solicit legal business for their attorneys or any particular attorneys; and * * *

One of the reasons why Petitioner began informing its members and families of deceased members to consult legal counsel was to prevent fraud from being perpetrated upon its members and families of deceased members, who have claims under the F.E.L.A. and other statutes. (R 938) See: *Ryan* v. *Penn.*, 268 Ill. App. 364, 373; *In re: Brotherhood of Railroad Trainmen*, 13 Ill. (2d) 391; *In re: Heirich*, 10 Ill. (2d) 357, 140 N.E. (2d) 825 (1957)

MOST STATES OF THE UNION HAVE SIMILAR RULES GOVERNING THE ETHICAL PRACTICE OF LAW

The American Bar Association said that most States and Local Bar Associations of the United States have adopted Canons of Ethics of the ABA and that the Canons have served as the basis for the Rules of Court, adopted by the Supreme Court of many States, particularly in those States having integrated Bar Associations, and further said that the principles set forth in the Canons derive in part from early statutes and those principles are today part of the statutory law of many States. (ABA B3)

The Illinois Supreme Court said In re: Brotherhood of Railroad Trainmen that the objectives of the Brotherhood asserted therein could be accomplished without lowering the standards of the legal profession in that State. Thus, the objectives of the Petitioner herein could be accomplished

without lowering the standards of the legal profession in Virginia, for the objectives are not in conflict with the prohibitions of common law, Rules of the Supreme Court of Appeals of Virginia, defining the practice of law, or the Canons of Professional Ethics adopted by it. 171 Va. pp. XXII, XXXIII, XXXV (1938): PB 6, footnote 15, PB 32.

VI.

DIFFERENCE BETWEEN ARGUMENTS OF RESPONDENT AND AMERICAN BAR ASSOCIATION

The Brief Amicus Curiae, by the American Bar Association, is completely dissimilar from that filed on behalf of the State Bar. That organization correctly perceives the conflict between the parties. That organization, while supporting the Virginia State Bar in its conclusion, neither argues nor contends that there is no question in dispute between the parties. The Amicus correctly sees the heart of the case is the exercise of free speech by the members of the Petitioner (Brief Amicus p. 20). It is submitted, however, that the ABA Brief fails to deal specifically with any of the incidents of the constitutional right of free speech and does not even mention the constitutional right of freedom of association.

Its Brief consists of neither sense nor sensibility, nor sensitivity to the rights of injured working men or to the widows of deceased working men killed in the annual carnage on the nation's railroads. Its answer to all of such social problems is to sneer and to question the motives of Petitioner. The assertion of the American Bar Association that the Brotherhood has a protected mode of "expression" so long as it keeps its interest in the claims of its injured

and deceased members general and non-specific, but that when it acts in a particular case it has withdrawn from the area of a "protected mode of expression" is hopelessly without merit. The constitutional rights of the members of the Brotherhood to associate together and through the exercise of free speech to strenuously advocate the prompt exercise of legal rights granted by Congress in the Federal Employers' Liability Act is a right for the here and now. It is not to be reduced to a right of theoretical and speculative value in order that the American Bar Association can say that it is protecting the right of the lawyer to be as objective as possible in handling the case (Brief Amicus p. 11). This is said to be the reason for the rules against solicitation and this is said to be sufficient reason why members of the Trainmen should be subjected to the Claim Agent's deceit as well as to the deprivation of their livelihood without redress.

The remedy for the abuses suffered by the Trainmen is said to be disbarment proceedings against ambulance chasing attorneys, and the remedy against Claim Agents is said to be to file complaints in the event of over-reaching (Brief Amicus p. 20). No remedy is suggested for the injured employee coerced into a position where he does not assert his legal rights. No attempt is made to establish that the punishment of an attorney or of a Claim Agent will result in the employee receiving compensation for the injury he has suffered. The American Bar Association, and the State Bar of Virginia, would prohibit any effective assertion of the injured employee's rights in the here and now and, instead, suggests he engage in a campaign of vengeance against those who deceive and over-reach him. Those associations imply that this should satisfy his demands for the rights which Congress intended he should have.

Moreover, this desire of the Amicus that lawyers apply their skill in as objective a manner as possible is a unique reason for the prohibition against unethical solicitation. Drinker, in his work on *Legal Ethics*, (Col. U. Press, 1959, p. 210) states that the rules against solicitation and advertising grew out of the fact that those practicing law in England were wealthy and did not have to worry about earning their keep. The growth of the rules is said, by Drinker, to have been caused by the desire of lawyers for the good opinion of their fellow lawyers (p. 211). Drinker also gives other common reasons ascribed to the reason for the rules (p. 212). Until the ABA Brief no one considered that a lawyer had to be as objective as possible in order to comply with the rules against solicitation.

Whatever the reason for the origin of the canons, it is submitted that cooperative activity by the members of the labor organizations representing the operating employees on the nation's railroads is essential to make the rights granted by the Federal Employers' Liability Act meaningful. Moreover, the rights here asserted are not limited to the injuries sustained by employees covered by the Federal Employers' Liability Act. Those rights are equally essential to union members covered by the various Workmen's Compensation Acts. A study has shown that industrial accident and unemployment compensation cases occupy more than half the labor lawyers in the United States, *Labor Union Lawyers; Professional Services of Lawyers to Organized Labor, 5 Ind. & Lab. Rel. Rev.*, 345, 361 (1952). This reliance by union members on the lawyers for their labor unions is traditional. It had grown out of a feeling by the early militant labor union organizers of distrust of lawyers. To all of the militant union members

of the last century, and of the early part of this century, the lawyer was the representative of vested interests and the procurer of the hated labor injunction. This feeling persists today. See, *Labor Union Lawyers; Professional Services of Lawyers to Organized Labor, 5 Ind. & Lab. Rel. Rev.*, 343, 358 (1952). Because of this hostility, the only effective way to see that union members obtain legal advice is to permit group referral to union lawyers. This is the basis of Petitioner's plan despite Respondent's contention that the Brotherhood established the plan for pecuniary gain (RB 49), even in defining that "pecuniary gain" as the type of gain resulting from the creation of an inducing cause for Trainmen to join the Brotherhood (RB 49). This is especially so when the rights asserted by Petitioner are such basic rights as the right to freedom of speech, and the right to freedom of association. Those fundamental rights permit the Brotherhood to advocate the employment of those lawyers in whom the Brotherhood has confidence.

Amicus contends that there is no lack of competition by competent counsel for such cases (p. 19). This statement by Amicus is pure assertion. It is true only in the sense that competent counsel are available in the cases involving serious injuries. Those employees suffering lesser injuries are required to have their cases handled by union lawyers or by union officers. The cases handled by the union officers are, of course, extremely minor cases and the policy of the Brotherhood has been that such cases may be settled for time lost after negotiations by the union committeeman (R 757, 758). However, Respondent contends that the courts have inherent power to control the legal profession. There is probably some such power in the courts but the extent of that power is irrelevant here since Respondent

is seeking to control the activities of a labor union which is not subject to any such inherent power. See, *Control of the Unauthorized Practice of Law; Scope of Inherent Judicial Power, 28 U. of Chi. L. Rev. 162.* Even if such inherent power did exist, it cannot override Petitioner's constitutional rights; especially is this true where there is no clear and present danger of a great evil. The only evil claimed by Respondent is an assumed loss of income to Virginia lawyers and an assumed concentration of service in the hands of fewer lawyers. See, *Drinker, Legal Ethics, Col. U. Press,* (1953 p. 167). Such claims do not merit the disregard of constitutional rights.

In considering the effect of the Railway Labor Act on the rights claimed here, Respondent again seems to assert an inherent right of the courts of Virginia to limit the rights of labor unions specifically granted by federal statutes. Next, Respondent having disregarded the Illinois decision throughout suddenly seizes upon a paragraph therein which rejects the applicability of the Railway Labor Act. Petitioner was willing to settle the instant case on the basis of the Illinois decision but such Consent Decree was rejected by Respondent. Since the Illinois decision could not be the basis of any agreement, Petitioner is not bound to adhere to a part thereof which it considers clearly erroneous. Respondent is even more erroneous when it attempts to rely on the 1926 hearings of the Railway Labor Act because the provisions here relied on, by Petitioner, were first enacted into the Railway Labor Act in 1934.

Finally, Respondent contends that Petitioner lacks good faith. This is a suprising comment coming from the

Respondent. Many cases have been brought against the Brotherhood involving its Legal Aid Plan. Consent Decrees have been urged on the basis that they would not be harmful since the Brotherhood was not engaged in the activities enjoined by consent. But the later proceedings relied on relief granted in prior proceedings and attempted to build thereon. Some of the cases criticising the Brotherhood relied on extremely attenuated grounds and the reversal of prior precedent in order to reach such result. Through all these proceedings, Petitioner attempted to arrive at an accommodation with the Bar. But apparently, no such accommodation was desired by the Bar. Instead, the Bar sought a more restrictive injunction than the Illinois opinion suggested. When these facts are considered, it is apparent that the absence of good faith is present on the side of the Respondent rather than on the side of the Petitioner in this case.

CONCLUSION

For the reasons adverted to above, and as set out in the Brief for Petitioner, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

BEECHER E. STALLARD
1123-29 Cen. Natl. Bank Bldg.
Richmond, Virginia

JOHN J. NAUGHTON
EDWARD B. HENSLEE
120 Madison Building
Chicago 2, Illinois

Counsel for Brotherhood of Railroad Trainmen

ARNOLD ELKIND
5411 Chrysler Building
New York 7, New York

Of Counsel

A Separate Certificate is being made by counsel for the Petitioner, showing that three copies of this brief have been delivered to counsel for the Virginia State Bar.

BEECHER E. STALLARD
Counsel for Brotherhood of Railroad Trainmen

APPENDIX

VIRGINIA:

IN THE CHANCERY COURT OF THE CITY OF RICHMOND:

Commonwealth of Virginia,
ex. rel. Virginia State Bar,

vs

National Association for the Advancement of Colored People, etc., et al.

Memo Opinion upon Motion to Dismiss, dated June 28, 1963.

This suit in equity was instituted by the Commonwealth of Virginia at the relation of the Virginia State Bar, an administrative agency created by the General Assembly in 1938 "for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Supreme Court of Appeals under this act to a court of competent jurisdiction for such proceedings as may be necessary"; Acts of 1938, ch. 410, page 771.

The defendants are National Association for the Advancement of Colored People (a corporation generally referred to as NAACP, and, for brevity, so called in this opinion), and two of its affiliated organizations, one, the Legal and Defense Fund, Inc., a corporation, and the other, the Virginia State Conference of Branches, an unincorporated association.

The bill of complaint alleges that the defendants, acting together and in concert, are engaged in the unauthorized

practice of law in Virginia in that, among other practices and methods, they maintain absolute and complete dominion and control over litigation, to which none of the three is a party, through lawyers selected and paid by them, thus acting as lay agencies of "intermediaries".

The defendants filed answers in due course.

Except for a stipulation heretofore filed no evidence has been formally adduced and made a part of the record, though there have been numerous interrogatories and calls for the production of documents, many responses to which have been informally lodged with the court papers. The complainant has not rested.

This was the posture of the case when the United States Supreme Court on January 14, 1963, handed down its decision in "the Button case": *National Association for the Advancement of Colored People* v. *Robert Y. Button, Attorney General of Virginia, ET. AL.*, 371 U. S. 415; 9 L. ed. 2d 405.

Apparently influenced by the supposed impact of this decision the attorneys for the defendants in the instant case, after previous notice of their intent, moved this court to dismiss this case. This motion in writing was presented to the court on April 11, 1963, and then set down for argument on June 3, 1963. These dates are mentioned because the record shows that the motion was formally filed by court order entered on June 3, 1963, and it might be thought that the motion was heard without opportunity for preparation, argument and deliberation. The contrary is the fact. Ample time and opportunity was afforded,—and was availed of by industrious and able counsel on both sides. The argument that began on June 3, 1963, occupied

a day and a half. The court is indebted to counsel for this thorough and lucid presentation.

Counsel are in accord with the court that this motion is equivalent to a demurrer, the allegations of the bill being, for the purposes of this motion, taken as true. The motion has been referred to as "a belated demurrer,"—belated, because normally demurrers are filed and disposed of before answers are filed. Though somewhat unusual in our chancery practice this procedure has received the recent approval of our Supreme Court of Appeals; *NAACP* v. *Committee,* 201 Va. 890, 900, 901.

The court is of opinion that, if the evidence to be adduced sustains the allegations of the bill of complaint, either directly or by the proof of facts from which fair inferences may be drawn, then the defendants must be held to be engaged in the unauthorized practice of law, as defined by the appropriate authorities of the Commonwealth of Virginia; and they have adopted and employ methods of operation that are in violation of the settled policy of this State,—a policy that is clearly and definitely established, without ambiguity and without vagueness.

The scope of the case and the relief sought are in narrow compass. The suggestion at bar in the course of the argument that this litigation is designed to harass the defendants and to thwart them in their aims and objectives is without foundation. It is not the aims and objectives of the defendants that are here under attack. This suit is directed only against certain alleged methods and practices of the defendants that constitute the unauthorized practice of law in this State,—simply that, and nothing more.

No case has been called to my attention, and I am aware of none, that has denied the power of a state to define and regulate the practice of law within her borders.

Does *the Button case* announce a denial of this power? It does not. On the contrary, there is embodied in the majority opinion itself, to say nothing of the four (or three, if you please) dissenting opinions, the clearest implication that this power exists, and is recognized. The following is quoted *from the majority opinion:*

> "In the first place, *upon a record devoid of any evidence of interference by the NAACP in the actual conduct of litigation,* * * * the court", that is, the Supreme Court of Appeals of Virginia, "nevertheless held * * * etc."
>
> The italics are supplied to denote the present emphasis.

So that holding of the United States Supreme Court was in that respect based upon lack of evidence in the record in that case,—with an implication that the decision would have been different had the evidence been different.

It is not incumbent upon this court at this time,—if, indeed, it will ever be—to examine the record in *the Button case* as respect *facts.* It will eventually be the duty of this court to examine and weigh the evidence that may be adduced in this case at some future time. The evidence has not yet been adduced.

It should be such a truism as need not be expressed that this court, and all other courts, are bound by the principles of law announced by the Supreme Court of the United States within the scope of their adjudications. But the

examination and weighing of evidence is a matter of looking to the record in the particular case; and there cannot possibly be a binding precedent in this respect,—for the simple reason that one record differs from another.

Some courts have obviously been greatly impressed with the magnitude and importance of the objectives of the defendant organizations, and have given wide scope to their activities as warranted under the First Amendment freedoms. But no court, to my knowledge, has said that the ends sought justify any means that may be adopted by these organizations, or by any other groups.

The nearest thing I have encountered in legal literature to advocacy of the adoption as a tenet of the law of the dogma that "the end justifies the means", is the concluding sentence quoted in footnote 26 to the majority opinion in *the Button case*. This quotation is from Opinion 148, American Bar Association Committee on Professional Ethics and Grievances, 1947. The concluding sentence there quoted reads:

"These issues transcend the range of professional ethics."

A conviction that the integrity of the code of professional ethics, binding upon both the bench and the bar, must be preserved though the heavens fall, compels me to express disagreement with the pronouncement quoted.

That a majority of the Justices of the highest court in the land are in accord with this quoted pronouncement, in its express words and in its implications, passes belief. In fact only four of them unite in the opinion to which footnote 26 is appended. And I venture to express the hope

that an opportunity may soon be presented for assurance to be given that "the veil of the temple is not to be rent in twain from the top to the bottom."

This opinion should not conclude without reiteration of the posture of the cause in the present state of the record. This is a decision as upon a demurrer. The allegations of the bill are, at this time and for this purpose, accepted as true.

Also it should be said that the emphasis put upon the alleged control of litigation by a lay intermediary carries no implication that the evidence may not disclose other elements of the unauthorized practice of law sufficiently alleged to allow evidence in support. The minute description of one gate in a wall carries no intimation that there are no other gates. One set of facts alleged, if proved, would justify the granting of the relief sought, and require that the motion to dismiss be overruled. It is the settled practice of courts—a commendable practice—to decide no more than is necessary to support the judgment.

An order overruling the motion to dismiss may be presented for entry, saving all objections and exceptions. This order will make this opinion a part of the record.

BROCKENBROUGH LAMB

Richmond, Virginia,
June 28, 1963.